STATE OF MICHIGAN

COURT OF APPEALS

PLASTIPAK PACKAGING, INC.,

Plaintiff/Counter-Defendant/Appellant,

v

UNITED STATES FIRE INSURANCE CO.,

Defendant/Counter-Plaintiff/Appellee.

UNPUBLISHED
February 1, 2007

No. 271523
Wayne Circuit Court
LC No. 04-438832-CK

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order denying its motion for summary disposition and granting defendant summary disposition under MCR 2.116(C)(10). We affirm.

I. FACTS

This appeal arises out of an underlying personal injury action, involving plaintiff's employee, Angela Loescher. Loescher was injured while working at plaintiff's plant in Ohio. Loescher filed a workers' compensation claim in Ohio, as well as an intentional-tort lawsuit. Both claims were settled for $950,000.

Plaintiff's primary insurer, Travelers Insurance Company, issued three policies to plaintiff: a commercial general liability (CGL) policy, a primary workers' compensation and employers liability (WC/EL) policy, and an excess WC/EL policy. Defendant issued an excess (umbrella) policy to Absopure Water Company, naming plaintiff as an additional insured under that policy. Only two of the Travelers policies—the CGL policy and the primary WC/EL policy—were listed as underlying policies in the Schedule of Underlying Insurance (Schedule A) of defendant's policy. The excess WC/EL policy was not listed.

Plaintiff sought payment of the $950,000 settlement from Travelers and defendant. Travelers rejected plaintiff's claims under its CGL and primary WC/EL policies; however, Travelers paid $500,000 (policy limits) of the settlement under the excess WC/EL policy. Defendant rejected payment under its excess policy, because the Travelers excess WC/EL policy was not listed in defendant's Schedule of Underlying Insurance.

Plaintiff filed suit for declaratory relief on December 22, 2004, seeking a declaration that defendant owed coverage under the employer liability portion of its policy and that defendant must reimburse plaintiff the amount plaintiff paid to settle Loescher's claim that exceeded plaintiff's primary insurance ($450,000). On February 10, 2005, defendant answered and filed a counter-claim for declaratory relief. On January 18, 2006, plaintiff moved for summary disposition under MCR 2.116(C)(10), asserting that there was no genuine issue of material fact that defendant was obligated to reimburse plaintiff the $450,000 paid to Loescher because coverage exists under its policy and none of the policy's exclusions apply to preclude coverage in this case. Defendant cross-motioned for summary disposition under (C)(10), asserting the following alternative grounds: (1) the policy precludes coverage for claims that are not covered by the applicable underlying insurance; and (2) no coverage exists in this case because the occurrence requirement is not met and the "expected or intended" injury exclusion applies.

The trial court heard oral arguments on the parties' cross-motions, and it denied plaintiff's motion and granted summary disposition to defendant. Plaintiff also filed a motion for reconsideration, which was denied. Plaintiff now appeals.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for the claim. *Id*. When ruling on a motion under MCR 2.116(C)(10), we must consider the pleadings and all documentary evidence, including affidavits and depositions, in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*.

Further, an issue involving the proper interpretation of an insurance contract is also reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

III. ANALYSIS

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition based on the absence of the excess WC/EL policy in the Schedule of Underlying Insurance. We disagree.

"An insurance policy is a contract that should be read as a whole to determine what the parties intended to agree on." *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 332; 632 NW2d 525 (2001). To determine whether defendant must provide coverage in this case, we must examine the language of the insurance policy and interpret its terms in accordance with the principles of contract construction. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 417; 668 NW2d 199 (2003). "An insurance policy must be enforced in accordance with its terms." Allstate *Ins Co v McCarn* (*McCarn I*), 466 Mich 277, 280; 645 NW2d 20 (2002). "[T]herefore, if the terms of the contract are clear, we cannot read ambiguities into the policy." *McKusick, supra* at 332. Indeed, our Supreme Court has mandated enforcement of the plain terms of unambiguous contracts, stating that "contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing

whims of members of [the court]." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 582; 702 NW2d 539 (2005); see also *Rory*, *supra* at 468 (emphasis in original) ("A fundamental tenet of our jurisprudence is that unambiguous contracts are not open to judicial construction and must be *enforced as written*.").

Further, while exclusions are strictly construed in favor of the insured, *McKusick*, *supra* at 333, clear and specific exclusions must be given effect because an insurance company cannot be held liable for a risk it did not assume. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999). And determination of the scope of coverage is a separate inquiry from whether coverage is negated by an exclusion. *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 172; 534 NW2d 502 (1995). Therefore, we must first decide whether coverage exists under the policy, then we can determine whether that coverage is precluded by an exclusion. *Allstate Ins Co v McCarn* (*McCarn II*), 471 Mich 283, 287; 683 NW2d 656 (2004).

Defendant's policy provides, in pertinent part, as follows:

> THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
>
> EMPLOYERS LIABILITY LIMITATION
>
> With respect to "Bodily Injury" sustained by any of your employees arising out of, and in the course of employment, this policy is limited to the coverage provided by the "Underlying Insurance".
>
> If coverage is not provided by "Underlying Insurance", coverage is excluded from this policy.
>
> * * *
>
> I. COVERAGE
>
> A. We will pay on behalf of the "insured" those sums in the excess of the "Retained Limit" which the "Insured" by reason of liability imposed by law, or tort liability assumed by the "Insured" under contract prior to the "Occurrence", shall become legally obligated to pay as damages for:
>
> 1. "Bodily Injury" or "Property Damages" occurring during the Policy Period stated in Item 2 of the Declarations and caused by an "Occurrence".

Occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions that result in 'Bodily Injury' or 'Property Damage' that is not expected or intended by the 'Insured'." Underlying insurance is defined as "the policies and/or Self-Insurance listed in Schedule A-Schedule of Underlying Insurance."

Plaintiff asserts that coverage exists under the policy because plaintiff is an insured and the policy lists employer liability as one of the covered risks. Specifically, plaintiff contends that because Schedule A identified Travelers as the underlying insurer, it does not matter that the particular policy that actually paid was not listed in the Schedule. Conversely, defendant asserts

that there is no coverage in this case because the underlying insurance did not cover plaintiff's claims, i.e., the policy that actually paid plaintiff's claim was not listed in the Schedule, so it was not a scheduled policy, and defendant's policy does not apply. We agree with defendant.

The policy states that coverage is "limited to the coverage provided by the "Underlying Insurance'." Thus, defendant's policy only provides coverage if coverage is provided by the Underlying Insurance (the policies listed in Schedule A). There was no coverage provided by the Underlying Insurance in this case. Therefore, according to the plain terms of the contract, there was no coverage available under defendant's policy. Just because the Traveler's excess WC/EL policy covered plaintiff's loss, does not mean that defendant is obligated to pay. That is not what the parties bargained for.

Plaintiff was asked to identify all Underlying Insurance policies at the time of application. Plaintiff did not identify the Traveler's excess WC/EL policy, but did identify the primary CGL and WC/EL policies. Defendant's policy was issued without policy numbers listed in Schedule A. After issuance of the policy, plaintiff's insurance agent provided defendant with the policy numbers, which were incorporated into Schedule A, and which again did not include the Traveler's WC/EL excess policy. Further, later correspondence between plaintiff and its insurance agent indicated that plaintiff inquired about adding the WC/EL excess policy to the Schedule. Therefore, we conclude that this evidences that plaintiff never intended to list the Traveler's excess policy in Schedule A; and this is not a case of merely failing to list the proper policy number in the Schedule as plaintiff argues.

Plaintiff further contends that because defendant knew that Travelers was the underlying insurer, the absence of the WC/EL excess policy number in Schedule A was not material to the contract and, therefore, should not preclude coverage in this case. Again, we disagree. As defendant argued, plaintiff's failure to identify the Traveler's excess WC/EL policy impacted defendant's ability to evaluate its risk and to assess the appropriate premium. Indeed, the primary policies listed in Schedule A contained exclusions that precluded coverage for the underlying claim, while the WC/EL excess policy that actually paid plaintiff's claim did not. Therefore, we conclude that the absence of the WC/EL excess policy number in Schedule A was material in this case.

We also reject plaintiff's argument that coverage exists under section K of the policy, which states as follows:

> K. MAINTENANCE OF UNDERLYING INSURANCE
>
> You agree that the "Underlying Insurance" shall remain in force during the policy period . . .
>
> * * *
>
> If you do not meet these requirements, this insurance shall apply as if the "Underlying Insurance" were available and collectible.

Plaintiff argues that the lack of the appropriate policy in Schedule A cannot preclude coverage when the policy applies even in the absence of Underlying Insurance. We disagree. First, the

endorsement, which precludes coverage when the Underlying Insurance does not provide coverage, controls in this case. Second, section K states that the policy will apply "as if the 'Underlying Insurance' were available and collectible." And as previously stated, the Underlying Insurance was not collectible in this case because of the exclusions in the primary policies.

Finally, plaintiff argues that this Court should reject defendant's argument as untimely because defendant did not decline coverage based on plaintiff's failure to list the WC/EL excess policy in Schedule A until 14 months after plaintiff gave notice of its claim. However, we need not consider plaintiff's argument because plaintiff failed to raise this argument below, and this Court is not required to consider unpreserved issues on appeal. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005) ("This Court need not consider issues that have not been presented or preserved.").

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Bill Schuette